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Veronica Lee Ha Ling & Ors v Maxisegar Sdn Bhd

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FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(I)–27 OF 2009(W)
ZAKI AZMI CHIEF JUSTICE, ALAUDDIN PCA AND GOPAL SRI RAM FCJ
7 AUGUST 2009

C

Civil Procedure — Appeal — Fresh or new issue not raised in trial proper or memorandum of appeal — Adducing of — Whether litigant allowed to raise issue not raised or pleaded at first instance

D

Contract — Breach — Performance of contract — Delay by developer in handing over vacant possession — Failure to obtain certificate of fitness — Failure to produce architect's certificate — Liquidated damages allowed

E

Contract — Damages — Liquidated damages — Damages for late delivery of vacant possession in sale and purchase agreement — Failure to obtain certificate of fitness — Failure to produce architect's certificate

F

The appellants had entered into separate agreements with the respondent ('licensed developer') to purchase apartments built by the latter. The appellants claimed compensation for late delivery on the grounds that no application had been made to the relevant local authority for a certificate of fitness. The High Court ordered the respondent to pay liquidated and ascertained damages for late delivery. The respondent appealed to the Court of Appeal. At the Court of Appeal, the appellants' claimed that the respondent breached cl 23 of the agreement which prescribed the precise manner in which the respondent was to deliver vacant possession to them. Nowhere in the affidavits filed in support of their originating summons did the appellants assert a violation of cl 23. The Court of Appeal varied the High Court's order by reducing the sum awarded on the grounds that time should stop running against the respondent as of the date of issuance of the temporary certificate of occupation. The appellants appealed against this decision.

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Held, dismissing the appeal with costs:

(1) No certificate by the vendor's architect certifying the matters in cl 23 was ever produced before the primary judge. The only document ever produced was an application for a certificate of fitness made by the respondent's architect to the relevant local authority. Hence the High

Court was entirely correct in holding that there had been late delivery and in awarding compensation for it. The Court of Appeal was accordingly wrong in interfering with the decision of the High Court (see para 5).

(2) The respondent was being asked to argue its case on a basis never put by the appellants to the High Court in the first place. Had the appellants' case been that cl 23 had not been complied with, then the respondent would have produced the appropriate certificate (see para 6).

(3) A litigant should not be permitted to succeed in an appeal upon a point not raised or pleaded before the court of first instance. It would be manifestly unjust for the appellants to succeed before the Federal Court on a point not taken before the High Court (see paras 8–9).

(4) In the circumstances of the case, the Court of Appeal's variation of the High Court's order had not produced an injustice to the appellants because of the way they had put their case at first instance (see para 9).

[Bahasa Malaysia summary

Perayu-perayu telah menandatangani perjanjian-perjanjian berasingan dengan responden ('pemaju berlesen') untuk membeli pangsapuri-pangsapuri yang dibina oleh pemaju tersebut. Perayu-perayu menuntut pampasan untuk penghantaran lewat atas alasan bahawa tiada permohonan dibuat kepada pihak berkuasa tempatan yang relevan untuk sijil kesesuaian. Mahkamah Tinggi memerintah responden untuk membayar ganti rugi jumlah tertentu dan dipastikan untuk penghantaran lewat. Responden merayu kepada Mahkamah Rayuan. Di Mahkamah Rayuan, perayu-perayu menuntut bahawa responden memungkiri klausa 23 perjanjian yang menetapkan cara tepat bagaimana responden menghantar milikan kosong kepada mereka. Tidak dijumpai di mana-mana pun di dalam afidavit-afidavit yang difailkan untuk menyokong saman pemula mereka yang perayu menegaskan pencabulan klausa 23. Mahkamah Rayuan mempelbagaikan perintah Mahkamah Tinggi dengan mengurangkan jumlah yang diawardkan atas alasan bahawa masa patut berhenti berjalan terhadap responden dari tarikh pengeluaran sijil penghunian sementara. Perayu-perayu merayu terhadap keputusan ini.

Diputuskan, menolak rayuan dengan kos:

(1) Tiada sijil oleh arkitek penjual mengesahkan perkara-perkara di dalam klausa 23 dikemukakan di hadapan hakim utama sebelum ini. Satu-satunya dokumen yang pernah dikemukakan adalah permohonan untuk sijil kesesuaian yang dibuat oleh arkitek responden kepada pihak berkuasa tempatan yang relevan. Maka, Mahkamah Tinggi betul sepenuhnya di dalam memutuskan bahawa terdapat penghantaran lewat dan di dalam mengawardkan pampasan untuknya. Mahkamah Rayuan

A oleh itu adalah salah apabila campur tangan dengan keputusan Mahkamah Tinggi (lihat perenggan 5).

(2) Responden dikehendaki untuk menghujahkan kesnya atas asas yang tidak dibangkitkan sebelumnya oleh perayu-perayu ke Mahkamah Tinggi. Jika kes perayu-perayu adalah bahawa klausa 23 tidak dipenuhi, responden mungkin akan mengemukakan sijil yang wajar (lihat perenggan 6).

(3) Litigan tidak patut dibenarkan untuk berjaya di dalam rayuan atas poin yang tidak dibangkitkan atau diplidkan di hadapan mahkamah pada mulanya. Ia adalah jelas tidak adil untuk perayu-perayu berjaya di hadapan Mahkamah Persekutuan atas poin yang tidak dibangkitkan di hadapan Mahkamah Tinggi (lihat perenggan 8–9).

(4) Dalam keadaan kes ini, perubahan oleh Mahkamah Rayuan terhadap perintah Mahkamah Tinggi tidak mengakibatkan ketidakadilan kepada perayu-perayu sebab cara mereka menghujahkan kes mereka pada mulanya (lihat perenggan 9).]

Notes

For cases on appeal generally, see 2 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 703–1701.

For cases on liquidated damages, see 3(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 3429–3452.

For cases on performance of contract, see 3(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2734–2744.

Cases referred to

Hoecheong Products Co Ltd v Cargill Hong Kong Ltd [1995] 1 WLR 404, PC (refd)

Lee Ah Chor v Southern Bank Bhd [1991] 1 MLJ 428, SC (refd)

SEA Housing Corporation Sdn Bhd v Lee Poh Choo [1982] 2 MLJ 31, HC (refd)

Sentul Raya Sdn Bhd v Hariram a/l Jayaram & Ors [2008] 4 MLJ 852, CA (refd)

Appeal from: Civil Appeal No W-02–125 of 2005 (Court of Appeal, Putrajaya)

Harpal Singh Grewal (Harwinder Kaur with him) (AJ Ariffin, Yeo & Harpal) for the appellants.

Ricky Tan Seng Cheong (Ricky Tan & Co) for the respondent.

Gopal Sri Ram FCJ (delivering judgment of the court):

[1] The appellants are house buyers. The respondent is a licensed developer. The appellants entered into separate agreements with the respondent to purchase apartments built by it. The respondent took the position that it had

delivered the apartments to the appellants in accordance with the agreements it had with them. The appellants disputed this. They took the position that there had not been delivery in accordance with the terms of the agreement. They claimed compensation for late delivery. The High Court agreed with the appellants and ordered the respondent to pay liquidated and ascertained damages for late delivery. The Court of Appeal varied the High Court's order by reducing the sum awarded. It did this on the basis that time should stop running against the respondent as of the date of issuance of the temporary certificate of occupation. As it happens, no such certificate was ever produced by the respondent at the hearing before the High Court. The appellants then obtained leave of this court and brought the appeal herein before us.

[2] The gist of the appellants' case before us is that the respondent breached cl 23 of the agreement in question. That clause reads:

> Upon the issuance of a Certificate by the Vendor's Architect certifying that the construction of the said Parcel has been duly completed and water and electricity supply are ready for connection to the said Parcel and the Vendor has applied for the issuance of the Certificate of Fitness for Occupation from the Appropriate Authority and the Purchaser having paid all monies payable under clause 4(1) in accordance with the Third Schedule and all other monies due under this Agreement and the Purchaser having performed and observed all the terms and covenants on his part under this Agreement the Vendor shall let the Purchaser into possession of the said Parcel.

[3] Now, cl 23 is part of a statute based contract. In this country, the relationship between a house buyer and a licensed developer is governed by the housing developers legislation. Its object is to protect house buyers against the developers. A developer must execute the agreement set out in the schedule to the relevant subsidiary legislation. He cannot add other clauses in it. As Suffian LP said in *SEA Housing Corporation Sdn Bhd v Lee Poh Choo* [1982] 2 MLJ 31:

> It is common knowledge that in recent years, especially when government started giving housing loans making it possible for public servants to borrow money at 4% interest per annum to buy homes, there was an upsurge in demand for housing, and that to protect home buyers, most of whom are people of modest means, from rich and powerful developers, Parliament found it necessary to regulate the sale of houses and protect buyers by enacting the Act. That was why r 12 was enacted and in particular paras (o) and (r) thereof. With respect we do not agree with Mr Chelliah that it was open to a developer to get round these paragraphs by the inclusion of such a clause as cl 32 in this agreement … In our judgment such details as are inserted into a written agreement must be details consistent, not inconsistent with the Act and rules.

[4] Similarly, in *Sentul Raya Sdn Bhd v Hariram a/l Jayaram & Ors* [2008] 4 MLJ 852, the Court of Appeal said of such a contract as in the present case:

> The contract which has fallen for construction in the present cases is a special contract. It is prescribed and regulated by statute. While parties in normal cases of contract have freedom to make provisions between themselves, a housing developer does not enjoy such freedom. Hence, parties to a contract in Form H cannot contract out of the scheduled form. Terms more onerous to a purchaser may not be imposed. So too, terms imposing additional obligations on the part of a purchaser may not be included in the statutory form of contract.

[5] The case for the appellants before us is this. Clause 23 prescribes the precise manner in which the respondent was to deliver vacant possession to them. It is common ground that no certificate by the vendor's architect certifying the matters in cl 23 was ever produced before the primary judge. The only document ever produced was an application for a certificate of fitness made by the respondent's architect to the relevant local authority. Hence His Lordship was entirely correct in holding that there had been late delivery and in awarding compensation for it. The Court of Appeal was accordingly wrong in interfering with the decision of the High Court.

[6] We were puzzled why, in the face of such a simple complaint by the appellants the respondent had not taken the rather obvious step of producing the architect's certificate. However, counsel for the respondent pointed out that this had not been done because the frontal attack at first instance was not on the non-compliance with cl 23 but that no application had been made to the relevant local authority for a certificate of fitness. Accordingly, the respondent was being asked to argue its case on a basis never put by the appellants to the High Court in the first place. Had the appellants' case been that cl 23 had not been complied with, then the respondent would have produced the appropriate certificate.

[7] Having perused the cause papers placed before the High Court, we are inclined to agree with learned counsel for the respondent. Nowhere in the affidavits filed in support of their originating summons did the appellants assert a violation of cl 23. In particular, there was no averment that the respondent's architect's certificate had not been served on the appellants. The thrust of the appellants' case appears to be that no application was ever made to the relevant local authority for a certificate of fitness. And it is in answer to that assertion that the respondent produced the relevant application.

[8] It is settled law that a litigant should not be permitted to succeed in an appeal upon a point not raised or pleaded before the court of first instance. The matter is really one of natural justice. The several authorities on the subject were collected and discussed in the judgment of Jemuri Serjan SCJ in *Lee Ah*

Chor v Southern Bank Bhd [1991] 1 MLJ 428. We would also refer to *Hoecheong Products Co Ltd v Cargill Hong Kong Ltd* [1995] 1 WLR 404 which sufficiently demonstrates the point.

[9] It would be manifestly unjust for the appellants to succeed before us on a point not taken before the High Court. Thus, although leave was granted to the appellants, we find it unnecessary to answer the question posed. It has become academic by virtue of the way in which the case was placed before the High Court. We would add that in the very special circumstances of this case, the Court of Appeal's variation of the High Court's order has not produced an injustice to the appellants because of the way they put their case at first instance.

[10] The appeal was accordingly dismissed with costs fixed at RM8,000. The deposit in court was ordered to be paid out to the respondent to account of fixed costs.

Appeal dismissed with costs.

Reported by Kanesh Sundrum